

Two Views of Hong Kong's Basic Law: From Beijing, "One Country" Must Dominate the Two Systems...

By Rao Geping

Discussion of any problems relating to Hong Kong must recognize its basic orientation.

When considering Hong Kong in relation to international law and Chinese domestic law, the following must be remembered: Hong Kong is no longer a British colony, nor is it an orphaned and self-ruled international metropolis, nor is it an independent administrative and economic entity slowly drifting away from Chinese sovereignty. Rather, it is a part of China and under Chinese sovereignty. The capitalist system of Hong Kong is one of two economic systems within the national boundaries, and the expression "one China" takes precedence over the understanding of "two systems." Only under the principle of "one China" does Hong Kong enjoy a high degree of autonomy, and this autonomy is clearly subject to the nation's central authority. The central government has rights and obligations, as well as power, so that it may attend to affairs related to Hong Kong. It conducts these in accordance with the regulations of the Basic Law of the territory, thus manifesting China's sovereignty.

The status of Hong Kong, in legal terms, is therefore quite clear. Currently and in the future, it is obliged to maintain and develop its capitalist system under the premise that it is part and parcel of China, and must do so within the framework of the policy which has governed Hong Kong's existence since its return to China in 1997. The overwhelming majority of Hong Kong compatriots recognize that identification with the motherland, patriotic love for both the mainland and Hong Kong, close interdependence and commitment to mutually enjoy glory and bear hardship, promote the territory's prosperity and stability as well as that of Greater China. This understanding is generally accepted as practical, rational and wise. Within this orientation exist all of Hong Kong's political and economical activities, political parties and citizens; they also are proscribed by its limitations. Furthermore, it is impractical and without legal merit to reject central authority, thereby laying undue emphasis on Hong Kong's autonomy. This would be a unilateral deviation from the principle of "One China, Two Systems," setting aside the former in favor of the latter.

The basic orientation of Hong Kong also connotes something else, namely, its ongoing development. Hong Kong's status cannot be elevated, but must retain its administrative and economic character under Chinese sovereignty. Though Hong Kong has become an international center for finance, trade and shipping, according to the dictates of history and international favor, it can never be considered a political entity, much less a country. Essentially, the political system which defines it is that of a non-sovereign state and non-political entity. In terms of its form, the political system is not entirely occidental nor is it completely oriental. It is an administration-led system formed according to Hong Kong's peculiar characteristics and has proved to be effective. This was true when Britain held the reins of power, and it is has continued since the territory returned to China. Hong Kong is merely a regional administrative and economic entity, and so the systems of the separation of powers (as in the United States) or the parliamentary system (as in

England) are unsuitable. Hong Kong's general developmental goals should not focus on politics but on economic issues and society. Maintaining Hong Kong's stability must refer to this basic orientation and stay within those guidelines. Certainly, democracy and universal suffrage are indispensable to its overall development, and they must be given full consideration and the needs of the people should get a proper response. As a matter of fact, these have been strongly affirmed and ensured in the Basic Law, which stipulates that democracy can only be carried out within the framework of "One China, Two Systems" and the specific provisions of that charter. This development of democracy must conform to Hong Kong's actual situation and should proceed in a gradual and orderly way.

Both the proposition to realize universal suffrage ahead of schedule and the proposition to set up a timetable cannot rely on the Basic Law for legal justification. Any deviation from the principle of "One China, Two Systems" is unquestionably invalid, as this would ignore the basic orientation of the territory and would be an attempt to transform Hong Kong into a political entity.

The Basic Law has constitutional status and dominates all other Hong Kong laws.

The Basic Law bears characteristics common to a constitution and allows the people of Hong Kong to administer their own affairs with the promised high degree of autonomy. It also bears authority as a national law of China. The Basic Law not only stipulates the sovereign ownership and legal status of Hong Kong, but also specifies the respective parties' permissible scope of authority and their interrelationship. Furthermore, it also provides for the territory's political system and economic development; it delineates the relationship of the executive, legislative and judicial powers and evolution of the electoral system; and it stipulates the rights and obligations of the Hong Kong inhabitants. The Basic Law dominates all local statutes of the territory, and enjoys constitutional status, namely, as a charter which cannot be defied and one that guarantees social stability and steady economic development. In light of this, all governmental institutions, organizations and individuals must strictly adhere to the Basic Law. Legally, there are no grounds for challenging the authority of this fundamental charter. This precludes any attempt to subvert the current political system or promote the unilateral acceleration of universal suffrage.

Indeed, as Hong Kong accepts the Basic Law as its new constitution, the territory needs to adapt and adjust; at the very least, it needs to fully understand and familiarize itself with the Basic Law. The local statutes of Hong Kong find their roots in common law, while the Basic Law, part of the nationwide law of China, contains characteristics of continental jurisprudence. The status and force of these two possess significant differences, though their aims are essentially one: to maintain the social order, prosperity and stability of Hong Kong. In terms of legal mechanism, both kinds of law need time to adapt to each other and thereby attain coordination and ultimate fusion.

Indeed, since Hong Kong returned to China, several significant disputes have arisen which may be attributed to a lack of understanding and familiarity with the charter. This shows the urgent need to strengthen the dissemination, study and comprehension of the Basic Law. The goal: to promote Hong Kong society's eventual acceptance and implementation of her constitution, a long-term task and responsibility that must not be taken lightly.

The Beijing approach of "hands off, achievable" within the boundaries of the Basic Law is the key to its success

The successful implementation of the principle, "One China, Two Systems," rests on a harmonious relationship between the Central Authorities and the Hong Kong Special Administrative Region (HKSAR), and whether or not the two parts of the principle, "one China" and "two systems," can be managed properly. The Basic Law is the only authority and as such must be followed. It is a nationwide law and possesses a universal binding force that guarantees the legalization and institutionalization of "One China, Two Systems." The Basic Law is not only the legal basis for the HKSAR's high degree of autonomy but also provides for the proper interaction of the Central Authorities with Hong Kong. On the one hand, the Chinese government should fully respect and guarantee the territory's high level of autonomy; it is also obliged to conduct Hong Kong affairs strictly within the scope of authority permitted in the constitution, engage this document respectfully, refrain from interfering in Hong Kong's business autonomy and sincerely maintain "two systems"—but under the preeminence of "One China." On the other hand, the Central Authorities should never relinquish their responsibility to justly discharge the several duties entrusted to them by the Basic Law. This involves firm implementation of the constitution, supervision over its performance, and careful and accurate adherence to its provisions so as to maintain the "One China" principle manifesting itself in "two systems."

The Central Authorities' approach of "hands off" by no means implies the abjuration of their authority; furthermore, this expression carries no sense of hands being tied or powerless. At the same time, "achievable" doesn't suggest that the Central Authorities will impose their will by ignoring the constitution; indeed, they must accept the Basic Law as the yardstick of administration. Within its stipulations, the central authorities must shoulder responsibility decisively, dare at times to take action, be progressive in their achievements and steadfastly back the principle of "One China, Two Systems."

This might even include occasions and situations when the Central Government must confront problems because Hong Kong's return to the motherland is just the initial step in a grand long march for the "One China, Two Systems." On this journey, there are hardships on the horizon, so both Central Authorities and Hong Kong must not entertain the slightest notion that they can rely on luck, nor treat mutual affairs lightly. Only when the principles of "hands off" and "achievable" enjoy equal consideration and impartial emphasis within the framework of the Basic Law can the essence of "One China, Two Systems" be grasped. This administrative guideline for relating the two parties in a harmonious and effective manner has already proven itself.

Better communication between the Mainland and Hong Kong is essential for implementing the "One China, Two Systems" policy.

"One China, Two Systems" is a political strategy intent on solving the residual problems of history. This principle is an ingenious mechanism for resolving issues within the boundaries of China and, clearly, it involves a great and unprecedented pioneering effort. Under the concept of "One China", the mainland and Hong Kong, embracing different social systems, are able to coexist harmoniously, even advancing hand in hand. This is the realization of a long-anticipated dream. In reality, however, all is not smooth sailing; eliminating such differentiae as social systems, life styles and value orientations, and doing so in a short period of time, is extremely difficult. Furthermore, certain intriguing and complicated elements exist between the Mainland and the territory; these continue to

impact Hong Kong's development and her relationship to the inland provinces, and they are deeply entrenched.

Hong Kong will undoubtedly require many years to grapple with the challenges of her new status and her relationship with the mainland as she endeavors to adapt to the political environment of "One China, Two Systems." In order to have a modus operandi that will diminish the potential disputes and points of friction between them, there must be a strict implementation of the Basic Law, a strengthening of exchanges and communication, and the promotion of mutual understanding and trust. Such a strategy of engagement will seek common ground and break down natural barriers, while retaining cultural distinctions. The process of communicating is a practical demonstration of the "One China, Two Systems" principle; furthermore, it fosters democracy, bridges the political inclinations and wisdom of the two sides, and serves to settle issues and build a harmonious society through active synergy.

Modes of exchange and communication between the Mainland and Hong Kong would be well-served if they are comprehensive, multi-level and diversified. Those which represent differing political views and factions are especially valuable and should be pursued. Such dialogue can be effective if carried out frequently and related to social systems, and when promoted both officially and unofficially. Fruitful exchanges and communication between the two sides have already proved beneficial and should be patiently followed, even raised to a higher level. The quality of such dialogue can be improved and the process of exchange has great potential.

"One China, Two Systems" contributes to the common interest of the entire Chinese population, and its smooth implementation must not be reckoned as a unilateral mission of either side. Nor can it be relegated to wishful thinking, but demands the sincere collaboration and combined energies of both. Further reinforcement and development of this relationship is eagerly anticipated as the two sides have their exchanges in years to come.

The NPC interprets the Basic Law in the hope of enriching it, and amendments must not be taken lightly

Law in general is of a determinate and stable nature, but it must keep up with the times and be constantly renewed. These changes are subject to the requirements of society and its ongoing development. Enriching and consummating any code of laws entails interpretation and amending; this process plays a vital role in comprehending and executing those laws. It also provides for their rich development as a matter of prudence and strictness. The Basic Law of Hong Kong, drafted 20 years ago and promulgated 15 years ago, went into effect in 1997. This law is both masterful and unprecedented, having demonstrated its effectiveness as the legal guarantor of the "One China, Two Systems" policy and must be followed in perpetuity. What's more, the Basic Law has been drafted according to the actual situation of both the Mainland and Hong Kong, and is subject to further enrichment and refinement as leaders seek to implement it in real life. The reasons for this are as follows:

Firstly, the Basic Law has a constitutional nature. Its content provides a yardstick and a framework but cannot take into consideration every detail of the society. Therefore, some articles of this document must of necessity be interpreted to fit concrete and practical concerns of the Hong Kong citizenry.

Secondly, the Basic Law, though appropriate for the actual situation of Hong Kong,

could not make detailed statutes in advance for all the issues which might arise after 1997. Hence, in the course of its implementation and in view of new problems and situations, the Basic Law needs to be supplemented. Lastly, it is necessary to explain, illuminate or clarify officially those articles of the Basic Law which might arouse contradictory understanding, alien interpretation or honest dispute. The eighth Chapter of the Basic Law therefore was drafted to provide direction for necessary interpretation or amendment.

The interpretation of a law, in terms of jurisprudence, involves such issues as the necessity of interpretation, the basis of interpretation, the interpretation legislature and the rules of interpretive procedure, plus the methods and principles of interpretation and their respective force. The common law system and the continental law system are widely divergent; Hong Kong's Basic Law is largely patterned after the latter. The three interpretations of the Basic Law by the Standing Committee of the National People's Congress played a very important role in settling disputes regarding Hong Kong and in helping to formulate the corresponding articles of the Basic Law. This was achieved by explaining, in a timely and effective way, some of the divergent interpretations which arose as the constitution were being developed.

It should be noted at this point that a portion of the Hong Kong citizenry, at least to some extent, finds it hard to accept the NPC's mode of interpreting the Basic Law. They lack understanding of their constitution and are not accustomed to this kind of interpretation, so this hinders the law's smooth implementation. Considering that the interpretation of law by the NPC can often be protracted and laborious, Hong Kong's constitution—when it was being formulated and interpreted—required an approach which summarizes the experience, increases public awareness and fosters transparency of the entire interpretive process. This would institutionalize and standardize the work, and minimize any mistrust or misunderstanding that might arise in the course of interpretation.

The authority and stability of the Basic Law affects the stability of Hong Kong's society, thus any amendment is a matter of extreme significance to be dealt with prudently and never in a careless fashion. However, it cannot be inferred that the Basic Law is exempt from change; in fact, amending it can take place for certain reasons and in accordance with certain legal procedures. Any amendment must be judged to be an actual necessity and must foster Hong Kong's development. It must conform to the principle of "One China, Two Systems" and favor the territory's prosperity and stability. All this is stipulated within the Basic Law. The ultimate issue is not whether the constitution needs an amendment or whether it can be amended, but how to do it and how to do it well. Amending the Basic Law, in keeping with its drafting process, involves understanding the larger picture and the magnitude and complications of such a project. It is crucial to consider the timing of the amendment, anticipate the problems which a change could create, and handle the procedure in such a deft manner as to gain public approval, maintain a consistent relationship between the central authorities and the territory, and organize and coordinate the amendment process by thorough research and careful deliberation.

Confidence runs high that talented Hong Kong citizens, because of their allegiance to the concept of "One Country, Two Systems" and their devotion to Hong Kong, will pay attention to and participate in any potential amendment in a spirit of calmness, prudence and rationality. This will add luster to their constitutional document and enhance its current high standing. ■

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